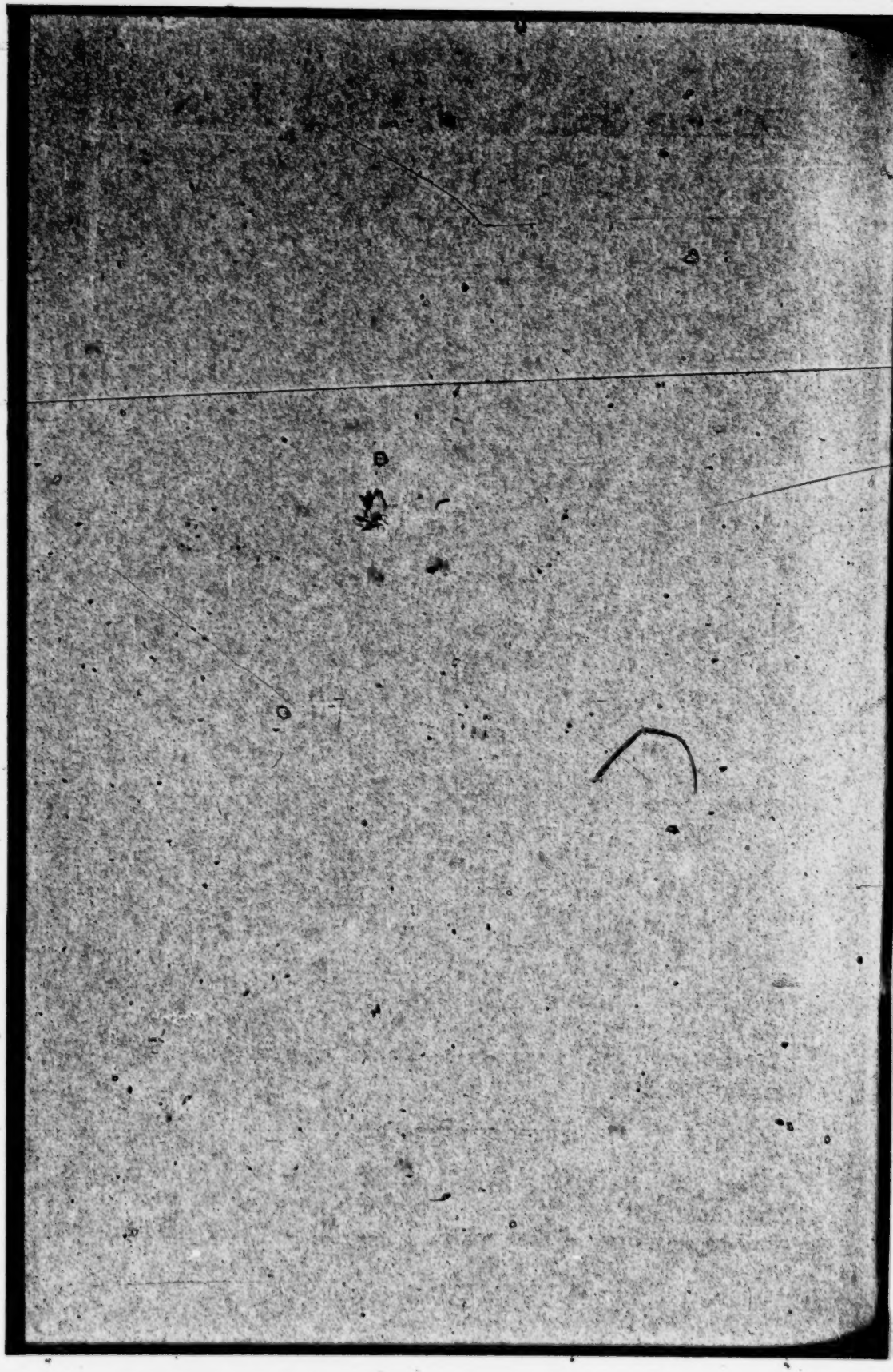


IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 873

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

AGAINST

THE NEW YORK TRUST COMPANY, as Trustee under Trust Indenture, dated December 24, 1921, by and between Conrad Henry Matthiessen and said The New York Trust Company,
Respondent.

RESPONDENT'S CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The Solicitor General, on behalf of the Commissioner of Internal Revenue, has petitioned for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit, entered December 26, 1933. Respondent has filed a brief in opposition.

Respondent prays, however, that if a writ of certiorari is granted on the petition of the Solicitor General, a writ of certiorari likewise be granted on this cross-petition.

If the Solicitor General's petition is denied, Respondent does not pray that a writ of certiorari be granted on this cross-petition.

Question Presented

Does Section 202(a) (2) of the Revenue Act of 1921, providing that the basis of "property acquired by gift" shall be the same as that which it would have in the hands

of the donor, apply where a trustee in 1922 sold corporate stock acquired in 1921 from the grantor upon the creation of the trust?

Statutes Involved

The Statutes involved are set forth in the Appendix, *infra*, pages 5, 6.

Statement

In 1906 Conrad Henry Matthiessen acquired 6,000 shares of common stock of Corn Products Refining Company for $141,375 (R. 61). In 1921 Matthiessen transferred the stock to Respondent as trustee for the grantor's son, Erard A. Matthiessen, with remainders over in case of the death of said son (R. 61). When the trust was created the stock was worth $577,500 (R. 62). In 1922 the trustee, by virtue of its powers under the trust deed, sold the stock for $603,385 (R. 62).

The Commissioner, in computing profit realized on the sale, used as a basis the grantor's cost, relying on Section 202(a) (2) of the 1921 Act, and determined that the gain was not taxable, under Section 206 of that Act, as a capital gain from property "held" for over two years. The Board of Tax Appeals sustained the Commissioner. The Circuit Court sustained the Board as to basis, but, one judge dissenting, reversed its decision as to capital gain.

Specification of Errors to be Urged

1. The Circuit Court of Appeals erred in holding that the gain should be computed on the basis of cost of the stock to the grantor.

2. The Circuit Court of Appeals erred in failing to hold that the gain should be computed on the basis of the value of the stock at the time transferred in trust.

Reasons for Granting the Writ

1. One issue, the capital gain question, was decided by the Circuit Court in favor of the taxpayer; one issue, the cost basis question, was decided in favor of the Commissioner. If the writ prayed for by the Solicitor General to review the capital gain question is granted, we respectfully submit the whole case should be reviewed by the Court, including the issue as to cost basis, decided against the taxpayer.

If the Circuit Court's decision as to capital gain should be reversed and this Court did not consider the question as to basis, the result would be exceedingly harsh. If the grantor had sold the stock and put the proceeds in trust, thereby arriving at the same result as that accomplished, the grantor would have paid a maximum tax on the transaction of about $57,000.* The Solicitor General seeks to establish a tax against the trustee with respect to the sale of $251,497.40,** more than fifty per cent. of the appreciation realized after holding the stock for sixteen years. We submit every opportunity should be afforded the taxpayer to question such a result.

2. The decision below as to cost basis is erroneous. Section 202(a) (2) applies only where the "property" sold was acquired by the taxpayer "by gift." Here the "property" was trust corpus and the taxpayer is the trustee. *Anderson* v. *Wilson*, 289 U. S. 20. The phrase "by gift" characterizes the *acquisition*, and the taxpayer must be a donee before the statute can be invoked. A trustee is not a donee any more than is a custodian or a bailee. While the grantor may have made a "gift,"

*12½% of $462,010. (the difference between $141,375, cost to grantor, and $603,385, selling price).

**The difference between the tax payable excluding this transaction and the tax payable including this transaction as ordinary gain. (See R. 54, 58.)

and therefore the transaction could have been taxed as a "gift," *Commissioner* v. *Guggenheim*, 288 U. S. 280, the donees were the life tenant and the remaindermen, who are taxpayers separate and distinct from the trustee. *Anderson* v. *Wilson, supra.* Had they sold their interests, there would have been a very different question.

Congress did not intend the gift basis provision to apply to sales by trustees. This is evidenced by the insertion of a specific and separate provision as to trusts in the Revenue Act of 1924 (see Appendix, *infra*, pp. 5, 6), and the Committee reports recommending this provision.* In all subsequent Revenue Acts the distinction between gifts and trusts for purposes of basis has been carefully preserved.**

If Section 202(a). (2) is not applicable, the proper basis is value at the time the stock was transferred in trust. *Heiner* v. *Tindle*, 276 U. S. 582; *Rice* v. *Eisner*, (C. C. A. 2) 16 F. (2) 358.

WHEREFORE, it is respectfully prayed that if a writ of certiorari is granted on the petition of the Solicitor General, but not otherwise, a writ of certiorari be granted on this cross-petition.

Respectfully submitted,

J. DU PRATT WHITE,
Counsel for Respondent
(Petitioner on Cross-Petition).

March 1934

---

* House Ways and Means Committee Report, dated February 11, 1924, p. 16, accompanying H. R. 6715. Senate Finance Committee Report, dated April 10, 1924, p. 17, accompanying H. R. 6715.

** See 1926 Act, Sec. 204(a) (2), (3) and (4); 1928 Act, Sec. 113(a) (2), (3) and (4); 1932 Act, Sec. 113(a) (2), (3) and (4).

Appendix

Revenue Act of 1921; c. 136, 42 Stat. 229.

Sec. 202. (a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal or mixed, acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * * * *

(2) In the case of such property, acquired by gift after December 31, 1920, the basis shall be the same as that which it would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift. If the facts necessary to determine such basis are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis shall be the value of such property as found by the Commissioner as of the date or approximate date at which, according to the best information the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner. In the case of such property acquired by gift on or before December 31, 1920, the basis for ascertaining gain or loss from a sale or other disposition thereof shall be the fair market price or value of such property at the time of such acquisition;

Revenue Act of 1924; c. 234, 43 Stat. 258.

Sec. 204. (a) The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913 shall be the cost of such property; except that—

* * * * * * *

(2) If the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor or the last pre-

ceding owner by whom it was not acquired by gift. If the facts necessary to determine such basis are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis shall be the fair market value of such property as found by the Commissioner as of the date or approximate date at which, according to the best information that the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner;

(3) If the property was acquired after December 31, 1920, by a transfer in trust (other than by a transfer in trust by bequest or devise) the basis shall be the same as it would be in the hands of the grantor, increased in the amount of gain or decreased in the amount of loss recognized to the grantor upon such transfer under the law applicable to the year in which the transfer was made. The provisions of this paragraph shall not apply to the acquisition of such property interests as are specified in subdivision (c) or (e) of section 402 of the Revenue Act of 1921 or in subdivision (c), (d) or (f) of section 302 of this Act;

(4) If the property was acquired by gift or transfer in trust on or before December 31, 1920, the basis shall be the fair market value of such property at the time of such acquisition.